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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 104.

IRENE HAND CORRIGAN and HELEN CURTIS,
Appellants,
against
JOHN J. BUCKLEY,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

APPELLANTS' POINTS.

MOORFIELD STOREY,
LOUIS MARSHALL,
ARTHUR B. SPINGARN,
HERBERT K. STOCKTON,
of Counsel.

JAMES A. COBB,
HENRY E. DAVIS,
WILLIAM H. LEWIS,
JAMES P. SCHICK,
Attorneys for Appellants.



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No. 104.

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Appeal from the
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APPELLANTS' POINTS.

The appellee filed a bill in equity in the Supreme Court of the District of Columbia in which he sought a permanent injunction against the defendant Irene Hand Corrigan, restraining her "from directly or indirectly selling and conveying or causing to be sold and conveyed to the defendant Helen Curtis" certain land in the City of Washington pursuant to a contract entered into, from making and delivering a deed or any other form of conveyance of the land to the defendant Helen Curtis, and enjoining the latter, her heirs and assigns, for the period of twenty-one years from taking title, directly or indirectly, to such land, and from using or occupying it and from selling, conveying, leasing, renting or giving the same to or permitting the same to be used or occupied by any negro or negroes or person or persons of the negro race or blood (*Rcc.*, pp. 5, 6).

The facts set forth in the bill and upon which this prayer for equitable relief is based are undisputed. The

appellee is the owner of premises known as 1719 S Street, N. W., Washington. The appellant Irene Hand Corrigan was the owner of premises known as 1727 S Street, N. W., Washington. On June 1, 1921, Buckley, Mrs. Corrigan and twenty-eight other persons, all of whom at the time owned twenty-three other parcels of land improved by dwelling houses adjacent and contiguous to and in the same immediate neighborhood as the lands of the appellee and Mrs. Corrigan and severally situated on both the north and south sides of S Street between New Hampshire Avenue and 18th Street, N. W., in the City of Washington, entered into a covenant which is set forth in the *Record* at pages 6-9.

This instrument, after reciting that the parties who executed it *are the owners* of real estate located in the District described and that they "desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve—in any legitimate way further the interests of said community," provides that the parties thereto mutually covenant, promise and agree with each other and for their respective heirs and assigns "that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by or sold, conveyed, leased, rented, or given, to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties here-to for the period of twenty-one (21) years from and after the date of these presents."

All the persons who executed this covenant are white persons, a large number of whom occupied, resided in and made their homes, and continued to occupy, reside and make their homes in the premises described (*Rec.*, p. 2).

On September 26, 1922, Mrs. Corrigan entered into a sales contract with Mrs. Curtis, by which the latter agreed to purchase from Mrs. Corrigan and she agreed to sell

and convey to Mrs. Curtis the premises 1727 S Street, Northwest, which instrument was duly recorded in the office of the Recorder of Deeds of the District of Columbia (*Rec.*, pp. 3, 9, 10). Mrs. Curtis is a person of the Negro race and blood.

A number of parties to the covenant thereupon "objected and protested to the defendant Corrigan against the execution or carrying out by her of the terms and provisions of said contract of sale," but on November 8, 1922, she definitely stated "that she would not fight the said contract of sale, that is to say, would not refuse to execute and carry out the terms and conditions thereof, nor would she refuse to sell and convey to the defendant Curtis the land and premises involved as aforesaid, nor would she refuse to make, sign, seal and deliver a deed to the same to said defendant last named, * * * and now is threatening to execute and carry out and is about to execute and carry out the terms and provisions of the aforesaid contract of sale and in pursuance thereof to sell and convey to the defendant Curtis the land and premises involved as aforesaid and to make, sign, seal and deliver a deed to the same to said defendant Curtis" (*Rec.*, pp. 4, 5).

After setting forth these facts, the bill of complaint alleges (*Rec.*, p. 5) :

"14. That if the threats aforesaid are fulfilled and carried out and the defendant sells and conveys to the defendant Curtis the said land and premises and makes, signs, seals and delivers a deed to the same to said defendant Curtis, irreparable injury will be done to the plaintiff and to the other persons who are parties to the aforesaid indenture or covenant and that plaintiff has no plain, adequate or complete remedy at law; *and plaintiff further avers that he is entitled to specific performance on the part of the defendant Corrigan of her said agreements and cove*

nants as set out in the said Indenture or Covenant mentioned and described in paragraph 6 of this bill and to have the terms and provisions of said Indenture or Covenant specifically enforced in equity by means of an injunction preventing both the said defendants Corrigan and Curtis from carrying into effect the said contract of sale mentioned and described in paragraph 7 of this bill."

Mrs. Curtis moved to dismiss the bill of complaint on the grounds that the alleged indenture or covenant was void, in that it attempts to deprive her and others of property without due process of law; abridges the privileges and immunities of citizens of the United States, and other persons within this jurisdiction, of the equal protection of the law, and is forbidden by the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments (*Rec.*, p. 11).

As appears from the opinion of the Supreme Court of the District of Columbia "the defendant urges very strongly in her brief that such a restriction is against public policy and the point is perhaps one that should be considered" (*Rec.*, p. 14). The Court thereupon discussed at length this point and passed upon it, and decided it adversely to the contention of Mrs. Curtis.

Mrs. Corrigan also moved to dismiss the complaint on the ground that the alleged indenture is void, that it is contrary to and in violation of the Constitution of the United States, and that it "is void in that the same is contrary to public policy" (*Rec.*, p. 17).

Both of these motions were overruled and both of the parties electing to stand on their motions to dismiss the Court permanently enjoined both of them in conformity with the prayer of the bill of complaint (*Rec.*, pp. 17-19).

An appeal was thereupon taken by both defendants to

the Court of Appeals of the District of Columbia, where error was assigned not only on the ground of the constitutional questions above stated, but also that the Court erred in holding that the covenant set out in the bill was not void as against public policy and in not holding to the contrary (*Rec.*, p. 19). The Court of Appeals affirmed the decree of the Supreme Court (*Rec.*, p. 25), and thereafter an appeal to this Court was allowed (*Rec.*, pp. 25-27).

Assignments of Error.

Among the Assignments of Error are the following (*Rec.*, p. 26) :

“3. The Court erred in holding that the indenture or covenant set out in appellee’s bill of complaint is not void as against public policy.”

“4. The Court erred in holding to the contrary.”

“5. The Court erred in not holding that the said indenture or covenant is void in that it deprives the defendants, appellants, and others, of property without due process of law.”

“6. The Court erred in holding to the contrary.”

“7. The Court erred in not holding that the said indenture or covenant is void in that it abridged the privileges and immunities of citizens of the United States, including the defendants, appellants, Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction.”

“8. The Court erred in holding to the contrary.”

“9. The Court erred in not holding that the said indenture or covenant is void in that it denied to the said defendants, the said Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction, the equal protection of the law.”

“10. The Court erred in holding to the contrary.”

"11. The Court erred in not holding that the said indenture or covenant is void in that it is forbidden by the Constitution of the United States and especially by the Fifth, Thirteenth and Fourteenth Amendments thereof, and the laws enacted in aid and under the sanction of the said Fifth, Thirteenth and Fourteenth Amendments."

"12. The Court erred in holding to the contrary."

POINTS.

I.

The decrees of the Courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law.

This proposition is the legitimate and logical consequence of the unanimous decision rendered by this Court in *Buchanan v. Warley*, 245 U. S., 60. There it was attempted, by legislation in the form of a city ordinance, to forbid colored persons from occupying houses as residences, or places of abode, or public assembly, on blocks where the majority of the houses were occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy were reversed, and which based the interdiction upon color and nothing more.

Here the decrees of the Supreme Court and the Court of Appeals of the District of Columbia have forbidden Mrs. Corrigan, a white person, from selling to Mrs. Curtis, a colored person, and Mrs. Curtis from buying, a house in the residential district of Washington, solely because Mrs. Curtis is of Negro race or blood, and forbidding Mrs. Curtis, her heirs and assigns, for a period of twenty-one years, from taking title to this property, from

using or occupying it, and from selling, conveying, leasing, renting or giving it to or permitting it to be used or occupied by any Negro or Negroes or persons of the Negro race or blood.

The question that was to be determined in *Buchanan v. Warley* was thus stated by Mr. Justice Day (p. 75) :

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property *of which occupancy is an incident*, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

In the course of the discussion of this proposition, it was said :

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S., 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

The opinion then considers the history of the Thirteenth and Fourteenth Amendments, quoting from the *Slaughter House Cases*, 16 Wall., 36; *Strauder v. West Virginia*, 100 U. S., 303, and *Ex parte Virginia*, 100 U. S., 339, 347.

A part of the quotation from *Strauder v. West Virginia* consisted of these passages (p. 77) :

"What is this (the Fourteenth Amendment) but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the

laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * * The Fourteenth Amendment makes no attempt to enumerate the rights its designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

The quotation from *Ex parte Virginia, supra*, is especially important:

"Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

It is proper to pause at this point to refer to the decision in *Virginia v. Rives*, 100 U. S., 313, rendered concurrently with *Ex parte Virginia*, where Mr. Justice Strong said:

"It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions

whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State."

We add a further quotation from the opinion in *Ex parte Virginia* (pp. 346, 347) :

"We have said the prohibitions of the Fourteenth Amendment are addressed to the States. * * * They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive *or its judicial authorities.* It can act in no other way."

In *United States v. Harris*, 106 U. S., 629, 639, this Court said:

"When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; *when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws;* *when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons,* the amendment imposes no duty and confers no power upon Congress."

So in *Scott v. McNeal*, 154 U. S., 34, it was held that the prohibitions of the Amendment extended to "all acts of the State, whether through its legislative, its executive, or its judicial authorities."

And in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S., 226, 233, Mr. Justice Harlan, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Further Mr. Justice Harlan says (pp. 234, 235) :

"But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

See also *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S., 278, where it was again declared that these provisions of the Constitution are generic in terms and are addressed not only to the States, but to every person, whether natural or judicial, who is the repository of State power, and that their reach is co-extensive with any exercise by a State of power in whatever form asserted.

The same effect has been given to the due process clause of the Fifth Amendment to the Constitution. Seventy years ago, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How., 276, Mr. Justice Curtis said:

"It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative

as well as on the executive and judicial powers of the Government."

In *Hovey v. Elliott*, 167 U. S., 409, this Court was called upon to determine the effect of an order rendered by the Supreme Court of the District of Columbia at General Term in a contempt proceeding, which decreed that the defendants' answer be stricken out and removed from the files of the court because of non-compliance on their part with the requirements of a decree previously rendered by the court, and that the cause should then proceed as if no answer had been interposed. It was held that the action of the court was a violation of the Fifth Amendment. Mr. Justice White, in the course of his comprehensive opinion, said:

"To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends" (p. 414).

Again, on page 417, he said, in words which could be well applied here:

"If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative

sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

Returning to the opinion in *Buchanan v. Warley*, supplemented by these utterances, which include in the constitutional inhibition not merely executive and legislative invasions of the right sought to be protected, but also those of the judicial arm of the Government, we find that, in giving legislative aid to these constitutional provisions, Congress made two statutory declarations, which constitute Sections 1977 and 1978 of the United States Revised Statutes. The first of these reads:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

Section 1978 declares:

"All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

After referring to the authorities and statutes cited by

him, Mr. Justice Day very appropriately asked: "In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting *the occupation* of it for the sole reason that the purchaser is a person of color intending *to occupy* the premises as a place of residence?" He answered (p. 78):

"The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat., 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat., 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall v. DeCuir*, 95 U. S., 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S., 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without State legislation discriminating against him solely because of color."

The opinion then refers to and distinguishes *Plessy v. Ferguson*, 163 U. S., 537, and other cases, which will be considered later.

The final paragraph of the opinion states the deliberate conclusion of this Court:

"We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the

State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

We have, therefore, the solemn pronouncement of this tribunal, that it was not within the legislative power of the State, or any of its instrumentalities, to forbid Mrs. Corrigan from selling her house to Mrs. Curtis, or the latter from purchasing and occupying it.

For the reasons considered in *Buchanan v. Warley*, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative branch to authorize.

As has been shewn, this court has repeatedly included the judicial department within the inhibitions against the violation of the constitutional guaranties which we have invoked.

We cannot emphasize too strongly that the immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the appellants have been deprived of their liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereignty power. It is not Buckley, the appellee, but the sovereignty, which speaks through the Court, that has issued

a mandate to the appellants which prevents Mrs. Corrigan from selling, leasing or giving her property to Mrs. Curtis, and the latter from acquiring and occupying the property, simply because she is of the negro race or blood.

In rendering these decrees, the Courts which have pronounced them have functioned as the law-making power. It is they who are seeking to effectuate the policy of racial segregation based on color. They have virtually announced to all colored persons: "You shall not inherit, purchase, lease, sell or hold real property for the acquisition of which you have entered into a contract, simply because you are of the negro race or blood." They have told those of the white race who have entered into a covenant such as is referred to in the decrees: "You shall not sell, lease or give your property to any person of the negro race or blood."

They have practically declared: "If the owners of property in a particular locality, however extensive its area may be, see fit to agree on such a policy of segregation, these Courts, sitting in equity, may nevertheless by their decrees enforce such a policy, even if it be conceded that they would be prohibited from doing so by the decision of the Supreme Court of the United States if the legislative branch of the Government had established a like policy."

To test the incongruity of such a situation, let us suppose that after the decision in *Buchanan v. Warley* the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the Courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review.

Or let us suppose, that after the rendition of these de-

crees, Mrs. Corrigan, standing on her constitutional rights, had executed a deed of the premises here in question to Mrs. Curtis, and the latter had proceeded to occupy them, would it have been within the competency of the court to have imprisoned either or both of them as for a contempt of court? The exercise by the Court of its power to enforce its decrees through the medium of contempt proceedings, would be nothing more or less than the enforcement of the policy of racial segregation based on color, in violation of the letter and spirit of the Constitution as interpreted in *Buchanan v. Warley*.

After *Buchanan v. Warley* had been remanded by this Court to the Kentucky Court of Appeals for further proceedings not inconsistent with the opinion rendered, would this Court have countenanced an amendment of the decree which it had reversed, providing that ninety per cent. of the residents of the district in which segregation had been attempted might enter into a covenant in precisely the same terms as the ordinance and that, thereupon, such covenant should be in full force and effect?

In *Gondolfo v. Hartman*, 49 Fed. Rep., 181, Judge Ross said (p. 182) :

"It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restrictive application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while the State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the *Courts may enforce*. Such view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the Court should no more enforce the one than the other. This would seem to be very clear."

After citing *Kennett v. Chambers*, 14 How., 49, the opinion continues (p. 183) :

"But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, and in violation of the principles embodied in its Constitution. Such a contract is absolutely void and should not be enforced in any court, certainly not in a court of equity of the United States."

In *Plessy v. Ferguson*, as pointed out by this Court, there was no attempt to deprive all persons of color of transportation in the coaches of a public carrier. The express requirements of the statute there challenged were for equal, though separate, accommodations for the white and colored races.

On the other hand, in *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S., 151, a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish them for colored people, was held to be unconstitutional.

The Applicability of Constitutional Amendments to the District of Columbia.

In the opinion rendered by the Supreme Court of the District of Columbia in the present case it was suggested (*Rec.*, p. 12) that the Court of Appeals of the District had held that the Fourteenth Amendment was not in force in the District of Columbia, citing *Siddons v. Edmonston*, 42 App. D. C., 459; at the same time adding that since the provisions of that Amendment are, so far as concerns the question here involved, as broad at least as those of the Fifth and Thirteenth Amendments and if the provisions of the Fourteenth Amendment would not, if applicable, sustain the defendants' contention, it was unnecessary

to consider the other two Amendments (*District of Columbia v. Brooke*, 214 U. S., 138, 149). In that view of the case, the Court decided that the Fourteenth Amendment did not sustain the defendants' contention.

We have already considered that aspect of the subject. We deem it appropriate, however, to call attention to the decisions which we contend render applicable to the District of Columbia the several constitutional amendments to which reference has been made.

In *Downes v. Bidwell*, 182 U. S., 244, 259, 263, the applicability of the Constitution to the District of Columbia was exhaustively considered. Referring to *Loughborough v. Blake*, 5 Wheat., 317, attention was called to the fundamental fact that the District of Columbia consisted of territory which had been originally a part of the States of Maryland and Virginia. Subsequently, in 1846, the portion of the territory granted by Virginia was retroceded to that State (9 U. S. St. L., 35; *Evans v. United States*, 31 App. D. C., 544). Therefore the territory that now constitutes the District of Columbia was Maryland territory. Consequently, as said by Mr. Justice Brown:

"It had been subject to the Constitution and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void."

If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government."

It was accordingly held that Article I, Section 8, of the Constitution, which gave Congress the power "to lay and collect taxes, imposts and excises" which "shall be uniform throughout the United States," extended to the District of Columbia. This conclusion, so far as it affected the District of Columbia, was approved in the opinion of Mr. Justice Brown, although he and four other Justices of this Court did not consider the constitutional provision there under consideration as applicable to the Territories. On the other hand, however, the members of the Court who were in the minority, namely, Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, went even further than Mr. Justice Brown, and held that the constitutional provision followed the flag and operated throughout "the geographical unit known as the United States," "our great Republic, which is composed of States and Territories" (182 U. S., 356). *It follows that a majority of the Court recognized that the Constitution applied to the District of Columbia.*

It has been held expressly that the Fourth Amendment, relating to searches and seizures, *Stoutenburgh v. Frazier*, 16 App. D. C., 229, *Curry v. District of Columbia*, 14 App. D. C., 423; the Fifth Amendment, *Wight v. Davidson*, 181 U. S., 371, *Moses v. United States*, 16 App. D. C., 428; the Eighth Amendment, concerning excessive bail, fines and unusual punishments, *Stoutenburgh v. Frazier*, 16 App. D. C., 229; and the provisions relating to jury trials, *Cal-*

lan v. Wilson, 127 U. S., 540, are all applicable to the District of Columbia.

In *Curry v. District of Columbia, supra*, the Court said:

"No more in the District of Columbia than anywhere else within the United States, could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but * * * all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this District which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation."

In *Lappin v. District of Columbia*, 22 App. D. C., 68, 75, Mr. Justice Shepard said:

"It must be conceded that the Fourteenth Amendment, which expressly declares that no State shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may, therefore, deny to persons residing therein the equal protection of the laws. All of the guaranties of the Constitution respecting life, liberty, and prop-

erty are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several States. *Callan v. Wilson*, 127 U. S., 540; *United States ex rel. Kerr v. Ross*, 5 App. D. C., 241, 247; *Curry v. District of Columbia*, 14 App. D. C., 423."

In *Callan v. Wilson*, *supra*, Mr. Justice Harlan said (p. 549) :

"And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property—especially of the privilege of trial by jury in criminal cases."

In the opinion of Mr. Justice Brown in *Downes v. Bidwell*, *supra*, *Callan v. Wilson* was declared to be in line with *Loughborough v. Blake*.

In *Smoot v. Heyl*, 227 U. S., 518, which related to the

validity of a building regulation adopted by the Commissioners of the District of Columbia, which was challenged on the ground that it was "unconstitutional and void because its effect is to deprive your complainants of their property without due process of law and just compensation," this Court, in assuming jurisdiction, necessarily decided that the due process clause of the Constitution was applicable to the District of Columbia; and in the subsequent case of *Walker v. Gish*, 260 U. S., 447, in which the validity of a regulation relating to party walls in the City of Washington was challenged on the same ground, this Court likewise considered the due process clause as applicable to the District of Columbia.

In *Block v. Hirsh*, 256 U. S., 135, in which the constitutionality of the Rent Laws of 1919 enacted for the District of Columbia was attacked on the ground that they involved the taking of property not for public use and without due process of law, this Court elaborately discussed their constitutionality; as it did in *Chastleton Corporation v. Sinclair*, 264 U. S., 543, that of the act passed in 1922, whereby it was attempted to extend the duration of these laws.

In *Adkins v. Children's Hospital*, 261 U. S., 525, which related to the constitutionality of the District of Columbia Minimum Wage Law, this Court declared the law to be in contravention of the Constitution, particularly of the due process clause of the Fifth Amendment.

When, therefore, the Court below (*Rec.*, p. 12), in the face of these decisions, based its assertion that the Fourteenth Amendment was not in force in the District of Columbia, on the alleged authority of *Siddons v. Edmonston*, 42 App. D. C., 459, it is not surprising that we find that the Court there confined itself to a bald statement which as the context shows was clearly *obiter*,

"The prohibition in this Amendment, to which the appellee refers, applies to the States and not to the District of Columbia."

It is, however, surprising that the citation in support of that assertion is *District of Columbia v. Brooke*, 214 U. S., 138, when it distinctly appears that in that case, this Court declared it to be unnecessary to determine whether or not the Fourteenth Amendment applied to the District of Columbia, because it was conceded that the Fifth Amendment unquestionably did, and that it was not more extensive in its provisions than the Fourteenth Amendment. Therefore, reaching the conclusion that the legislation which was challenged on the ground that it denied the equal protection of the laws, merely involved such classification as had frequently been regarded as permissible under the Fourteenth Amendment, it was upheld as constitutional.

Hence, this Court did not in *District of Columbia v. Brooke* render a decision warranting its citation as authority for the proposition asserted.

It would seem, however, that if, as adjudged in *Loughborough v. Blake* and *Downes v. Bidwell*, the Constitution became irrevocably attached to the land which originally was a part of Maryland, upon its incorporation into the District of Columbia, the Constitution in its entirety became applicable to the District of Columbia. The Thirteenth Amendment, which abolished slavery and involuntary servitude, certainly did; that portion of the Fourteenth Amendment which related to citizenship, unquestionably did; as did the Fifteenth, Sixteenth and Nineteenth Amendments.

The suggestion that, because the prohibitions of Section 1 of the Fourteenth Amendment, against the abridgment of the privileges and immunities of citizens of the United States and against the deprivation of any person of life, liberty and property without due process of law and the denial to any person "within its jurisdiction" of the equal protection of the laws", begin with the words "No State" and "Nor shall any State", they do not apply to the District of Columbia, is a proposition that disregards the

manifest intention which gave rise to this Amendment and the historical conditions out of which it arose. From a constitutional standpoint, the District of Columbia at that time was regarded as on the same level with the State of Maryland, of which it had constituted a part.

To give so narrow an interpretation to the word "State" ignores not only the history of the District of Columbia, but also the fact that it was the very nucleus of the storm-centre out of which emerged the Fourteenth Amendment, that it was there that not only the Civil War had its most important setting, but where the pre-war and the post-war, scenes of the great drama which culminated in the adoption of the Thirteenth and Fourteenth Amendments were enacted. It is, therefore, as inconceivable that the District of Columbia is to be excluded from the operation of the Fourteenth Amendment as that it was intended to exclude it from the operation of the Eighteenth Amendment.

This Court had occasion in *Geofroy v. Riggs*, 133 U. S., 258, to consider the phrase "States of the Union" as contained in a clause of a treaty between the United States and France which related to the right of Frenchmen to enjoy the privilege of possessing personal and real property in "the States of the Union". There the question arose as to whether under this treaty, a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. It was held that the District of Columbia, as a political community, was one of "the States of the Union" within the meaning of that term as used in the treaty, Mr. Justice Field saying in support of that conclusion :

"This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union'. Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet

separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, sections 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn v. Ellzey*, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The Court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this Court in the recent case of *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S., 1, 9, decided at the present term."

In *Talbot v. Silver Bow County*, 139 U. S., 444, Mr. Justice Brewer, referring to a statute of Montana Territory

which undertook to tax the shares of a national bank pursuant to Section 5219 of the Revised Statutes, which conferred the power of taxation upon the legislature of each State, no reference being made to Territories, said:

"But it would militate much against its national character if banks organized under it (the national banking system) were subjected to local taxation in one part of the Union, and exempted from it elsewhere. No such intent ought lightly to be imputed to Congress. * * *

Still further, while the word 'State' is often used in contradistinction to 'Territory', yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this Court."

Then follow quotations from *Hepburn v. Ellzey*, *Metropolitan Railroad Co. v. District of Columbia* and *Geofroy v. Riggs, supra*.

At all events, there can be no question but that the due process clause of the Fifth Amendment applies to the District of Columbia, and, as has been shown, the same interpretation that has been given to the Fourteenth Amendment as to its applicability to the action of the judicial as well as of the executive and legislative departments of the Government, has been given to the Fifth Amendment.

The Right to Review the Rulings on Public Policy on this Appeal.

The appeal to this Court has been taken pursuant to Section 250 of the Judicial Code, for the purpose of presenting the constitutional questions thus far considered. That

procedure was pursued in *Smoot v. Heyl*, 227 U. S., 518, and in *Walker v. Gish*, 260 U. S., 447.

In the first of these cases it was also decided that the appeal brought the entire case here, thus enabling this Court to determine not merely the question of constitutionality, but all other questions involved in the record.

Horner v. United States, No. 2, 143 U. S., 570; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S., 695.

This is in conformity with the procedure under Section 238 of the Judicial Code as laid down in numerous cases.

Pursuing the procedure thus authorized we will proceed to discuss other questions presented by the record and set forth in the assignments of error—

II.

The covenant the enforcement of which has been decreed by the Courts below is contrary to public policy.

(1) *The public policy of this country is to be ascertained from its Constitution, statutes and decisions, and the underlying spirit illustrated by them.*

The constitutional provisions considered under Point I unmistakably indicate that the segregation of colored people from white people and the statutory prohibition against the occupancy by colored persons of houses in restricted areas, are contrary to the genius of our institutions. An act which the legislature is prohibited from doing or authorizing must in its essence necessarily be opposed to public policy. So, likewise, whatever the legislative branch of the Government inhibits must be an offence against public policy.

As has been shown, Section 1978 of the Revised Statutes declares that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property. One would suppose that, if in the face of such a declaration a contract is entered into calculated to prevent the inheritance, purchase, lease, sale, holding and conveyance of real property by colored citizens of the United States in any State or Territory, such a contract is repugnant to our policy. It certainly was not intended that, if the white citizens of Washington agreed among themselves that they would not sell or lease any real property lying within the territorial limits of that city to a colored person, such an agreement would be enforceable as consonant with the controlling public policy.

And so when this Court has announced that legislation looking to the prevention of the acquisition of realty within a specified district by colored persons, is contrary to the Constitution and laws, it would seem to follow that a covenant between the white residents of that same district intended to prevent the acquisition of realty by colored persons, was contrary to our public policy.

In *Vidal v. Girard's Executors*, 2 How., 127, Mr. Justice Story pointed out that the policy of Pennsylvania on a particular subject was indicated by its Constitution and laws and judicial decisions. This view has been frequently adopted.

Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. R. Co., 70 Fed. Rep., 201, 202;
Hollins v. Drew Theological Seminary, 95 N. Y., 172;
Cross v. United States Trust Co., 131 N. Y., 344;
People v. Hawkins, 157 N. Y., 12.

In *Messersmith v. American Fidelity Co.*, 232 N. Y., 161, 163, Judge Cardozo said:

"The public policy of this State (New York) when the legislature acts is what the legislature says that it shall be."

Where would one be more likely to arrive at the sources from which our public policy is derivable than by exploring the Constitution and statutes of the United States and the adjudications of this Court? A student of our history like DeTocqueville, Bryce or von Holst would at once be struck by the inconsistency of the principle laid down in *Buchanan v. Warley*, with that expressed in the opinions rendered in the present case by the Courts below.

It would appear to be obvious that, where a legislature is prohibited from sanctioning a particular policy, individuals may not enter into contracts in direct derogation of the same policy. Surely that which a legislature cannot sanction should not be compelled to be done by a decree of a court of equity enforcing specific performance of an agreement between third parties, which is the equivalent of such legislation and is productive of identical results.

If such a contract as that involved in the present case is valid as affecting a limited area, it would be equally effective if it included an entire city, a county, or a State. If the Constitution could be evaded as it is attempted to be by the device here employed, it would not be difficult to create a situation bearing the elements of a contract that would prevent a colored person from owning realty, or from taking up his habitation, in any State or in any part of a State.

(2) *The covenant is not only one which restricts the use and occupancy by negroes of the various premises covered by its terms, but it also prevents the sale, conveyance, lease or gift of any such premises by any of the owners or their heirs and assigns to negroes or to any person or persons of the negro race or blood perpetually, or at least*

for a period of twenty-one years. It is in its essential nature a contract in restraint of alienation and is, therefore, contrary to public policy.

In the present case it is to be observed that the parties to the instrument sought to be enforced in this action have covenanted that no part of the land therein described owned by them "shall ever be used or occupied by or sold, conveyed, leased, rented, or given to negroes or any person or persons of the negro race or blood" (*Rec.*, p. 7). It binds the parties, their respective heirs and assigns, for all time. It is true that in the succeeding sentence it is declared that the covenant "shall run with the land * * * for the period of twenty-one years from and after the date of these presents." That does not, however, cut down the covenant as between the parties so as to limit it to a period of twenty-one years. But whether the covenant be regarded as a perpetual covenant or as one running for twenty-one years only, it is equally opposed to public policy.

The subject of such restraints is learnedly discussed in *DePeyster v. Michael*, 6 N. Y., 497, by Chief Judge Ruggles. He points out that they were of feudal origin; creative of a violent and unnatural state of things, contrary to the nature and value of property and the inherent and universal love of independence; that they arose partly from favor to the heir and partly from favor to the lord, "and the genius of the feudal system was originally so strong in favor of restraints upon alienation, that by a general ordinance, mentioned in the Book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off" (p. 498). To deal with this tyranny the statute of *Quia Emptores* was enacted in 18 Edward I, which provided "that from henceforth it shall be lawful for any freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffee held before."

As Chief Judge Ruggles says (p. 500) :

"The effect of this statute is obvious. By declaring that every freeman might sell his land, at his own pleasure, it removed the feudal restraint which prevented the tenant from selling his land, without the license of his grantor, who was his feudal lord. This was a restraint imposed by the feudal law, and was not created by express contract in the deed of conveyance; it was abolished by this clause in the statute. By changing the tenure from the immediate to the superior lord, it took away the reversion from the immediate lord; in other words, from the grantor, *and thus deprived him of the power of imposing the same restraint, by contract or condition expressed in the deed of conveyance.* The grantor's right to restrain alienation immediately ceased, when the statute put an end to the feudal relation between him and his grantee; and no instance of the exercise of that right, in England, since the statute was passed, has been shown, or can be found, except in the case of the king, whose tenure was not affected by the statute, and to whom, therefore, it did not apply.

The reason given by Lord Coke, why a condition that the grantee shall not alien, is void, is as follows: 'For it is absurd and repugnant to reason, that he that hath no possibility to have the land revert to him, should restrain his feoffee of all his power to alien. And so it is, if a man be possessed of a term for years, or of a horse, or any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alienate the same, the condition is void, because his whole interest and property is out of him, so that he hath no possibility of reverter; and it is against trade and traffic, and bargaining between man and man.'

In *Potter v. Couch*, 141 U. S., 296, 313, Mr. Justice Gray said:

"But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit., Sec. 360; Co. Lit., 206b, 223a; 4 Kent Com., 131; *McDonogh v. Murdock*, 15 How., 367, 373, 412. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. *Howard v. Carusi*, 109 U. S., 725; *Ware v. Cann*, 10 B. & C., 433; *Shaw v. Ford*, 7 Ch. D., 669; *In re Dugdale*, 38 Ch. D., 176; *Corbett v. Corbett*, 13 P. D., 136; *Steib v. Whitehead*, 111 Illinois, 247, 251; *Kelley v. Meins*, 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority [notwithstanding opposing dicta in *Cowell v. Springs Co.*, 100 U. S., 55, 57, and in other books], a restriction, whether by way of condition or of devise over, on any and all alienation, although for a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt v. Thurman*, 1 Johns., Ch. 220; *Mandlebaum v. McDonell*, 29 Mich., 77; *Anderson v. Cary*, 36 Ohio St., 506; *Twitty v. Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D., 801."

Especial attention is called to the exhaustive opinion in *Manierre v. Welling*, 32 R. I., 104, where many cases are cited and ably reviewed, and where one of the important conclusions reached in the case next to be cited was adopted:

"We are entirely satisfied there has never been a time since the statute *quia emptores* when a restric-

tion in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the Court of last resort; and upon what standard of certainty can the Court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

Equally important is the classic opinion of Mr. Justice Christianey in *Mandlebaum v. McDonell*, 29 Mich., 79, from which the foregoing excerpt is taken. That decision was approved not only by this Court in *Potter v. Couch*, 141 U. S., 315, 316, but also by the English Court of Chancery in *Re Rosher*, L. R. 26 Ch. Div., 801, an unusual compliment, especially since it resulted in the rejection of the decision of Sir George Jessel in *Re Macleay*, L. R. 20 Eq., 186.

The significance of this proposition is regarded as a justification for the citation of the following pertinent decisions.

In *Smith v. Clark*, 10 Md., 186, a devise of a woodlot to the testator's wife and daughters "on the express condition that the same is not at any time to be cleared or

converted into arable land," and a further condition that the land "shall be at all times held together by those who may be entitled to the same by virtue of the will," was held to be void.

In *McCullough's Heirs v. Gilmore*, 11 Pa. St., 370, the testator declared it to be his will and desire that a certain farm "fall into the possession of W, laying this injunction and prohibition not to leave the same to any but the legitimate heirs of W's father's family at his W's decease." This restraint on the power of alienation was held to be void.

In *Bennett v. Chapin*, 77 Mich., 527, it was held that when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, is against selling for a particular time, such restriction is invalid. Mr. Justice Long said:

"Such restraints are not favored in the law. It is true that many restrictions or qualifications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own. This rule was very fully discussed by this Court in *Mandlebaum v. McDonell*, 29 Mich., 87, and in support of this principle the Court cited *Hall v. Tufts*, 18 Pick., 459; *Bank v. Davis*, 21 Id., 42; *Brandon v. Robinson*, 18 Ves., 429; *Doebler's Appeal*, 64 Pa. St., 9; *Craig v. Wells*, 11 N. Y., 315.

Aside from these reasons, however, we think the restrictions upon the sale cannot be upheld. No such restrictions are valid. When a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, is against selling for a particular time,

such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. Gray, in his rules against Perpetuities, thus states the rule:

'Suppose property is given to trustees in trust to pay the principal to A when he reaches thirty. When any other person than A is interested in the property, when, for instance, there is a gift over to B if A dies under thirty, the trustee will retain the property for the benefit of B; but when no one but A is interested in the property, when, should he die before thirty, his heirs or representatives would be entitled to it, when, in short, the direction for postponement has been made for A's supposed benefit, such direction is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of the property in which no one but himself has any interest.'

The principle is generally held to be that all rights of property are alienable, and that a condition or restriction which would suspend all power of alienation for any length of time is inconsistent with the estate granted, and void."

In *Attwater v. Attwater*, 18 Beavan, 330, a devise of certain real estate to A "to become his property on attaining the age of twenty-five years, with the injunction never to sell it out of the family, but if sold at all it must be to one of his brothers hereinafter named," was held to be in restraint of alienation, and void.

In *Billing v. Welch*, Irish Rep., 6 Common Law, 88, a covenant by the grantee of land that he, his heirs and assigns would not alien, sell or assign to any one except his or their child or children without the license of the grantor, was declared void on the authority of the opinion of Lord Romilly in *Attwater v. Attwater, supra*.

In *Schermerhorn v. Negus*, 1 Denio, 148, a provision in

a devise to children that no part of the land should be aliened by any of the children or their descendants except to each other or their descendants, was held bad.

To the same effect are the decisions in *Johnson v. Preston*, 226 Ill., 447, 462, and *Purdue v. Givens*, 54 N. C., 306.

In *Anderson v. Carey*, 36 Ohio St., 506, the testator devised a farm to his two sons, Thomas and Lincoln, upon condition that they should not be allowed to sell and dispose of it until the expiration of ten years from the time his son Lincoln arrived at full age, except to one another, nor to mortgage or encumber it in any manner whatsoever except in the sale to one another. It was held that the restraint attempted to be imposed was void as repugnant to the devise and contrary to public policy. Mr. Justice McIlvaine said:

"Instead of giving to his sons an estate in the land less than a fee simple the intent and purpose was to give them the fee simple but to eliminate therefrom this inherent element of alienability for a limited period or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to wit, until the younger should arrive at thirty-one years of age—each and both of which purposes was repugnant to the nature of the estate devised. By the policy of our laws it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from the fee simple estate, either by deed or by will, must be declared void and of no force. * * * In holding that such restraint is repugnant to the nature of the estate devised and is void as against public policy, which, in this State, in the interests of trade and com-

merce, gives to every absolute owner of property who is *sui juris* the power to control and dispose of such property and subject the same to the payment of his debts, we are fully aware of the fact that many other authorities may and have been cited to the contrary."

In *Barnard v. Bailey*, 2 *Harrington* (Del.), 56, a condition in a devise that the devisee should not dispose of the property to the blood kin of either the testator or the devisee, was held to be bad.

In *Williams v. Jones*, 2 *Swan* (Tenn.), 620, there was a bequest to A on condition that she should not dispose of the property so as to allow either of four persons to get it. The condition was declared to be void.

In *Brothers v. McCurdy*, 36 Pa. St., 407, a testator directed that land devised to his son should not be sold to any person for the purpose of making brick or carrying on a brickmaking business, and more especially that he should not sell it to Lotz and Beasley, and declared that the devise of the lot was to be void in case of a sale contrary to his will, in which event the lot was to be held in common by the testator's other heirs. The gift over was adjudged to be void.

See also *Re Rosher*, L. R. 26 Ch. Div., 801, 816, and *Re Dugdale*, L. R. 38 Ch. Div., 176, 179, in both of which cases *In re Macleay*, L. R. 20 Eq., 186, was disapproved, as it likewise was in *Manierre v. Welling*, 32 R. S., 104.

In *Renaud v. Tourangeau*, L. R., 2 Privy Counsel App., 4, where a testator in Lower Canada devised real estate to her children, providing that they should in no way alienate the property until twenty years after his death, the Judicial Counsellor, per Lord Romilly, held that the restriction "was not valid either by the old law of France, or the general principle of jurisprudence."

In 4 Kent's Commentaries, 131, Chancellor Kent, discussing this general subject, said:

"Conditions are not sustained when they are re-

pugnant to the nature of the estate granted or infringe upon the essential enjoyment and independent rights of property and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee or by devise that the purchaser and devisee should not alien, is unlawful and void. If the grant be upon condition that the grantee shall not permit waste or not take the profits, or his wife not have her dower or the husband his courtesy, the condition is repugnant and void, for those rights are inseparable from the estate in fee. Nor could a tenant in tail, though his estate was originally intended as a perpetuity, be restrained by any proviso in the deed creating the estate from suffering a common recovery. Such restraints were held by Lord Coke to be absurd and repugnant to reason and to "the freedom and liberty of freemen." The maxim which he cites contains a just and intelligent principle worthy of the spirit of the English law in the best ages of English freedom: *iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* If, however, a restraint upon alienation be confined to an individual named to whom the grant is not to be made, it is said by very high authority to be a valid condition. But this case falls within the general principle and it may be very questionable whether such a condition would be good at this day. In *Newkirk v. Newkirk* (2 Caines, 345), the Court looked with a hostile eye upon all restraints upon the free exercise of the inherent right of alienation belonging to estates in fee; and a devise of lands to a testator's children in case they continued to inhabit the town of Hurley, otherwise not, was considered to be unreasonable and repugnant to the nature of the estate."

To the same effect are the following decisions:

Clark v. Clark, 99 Md., 356; 58 Atl. Rep., 24;

- Winsor v. Mills*, 157 Mass., 362; 32 N. E. Rep., 352;
Latimer v. Waddell, 119 N. C., 370; 26 S. E. Rep., 122;
Re Schilling, 102 Mich., 612;
Zillmer v. Landguth, 94 Wis., 607; 69 N. W. Rep., 568;
Jones v. Port Huron Engine & Thresher Co., 171 Ill., 502; 49 N. E. Rep., 700.

That the natural operation of such a covenant as that under consideration is opposed to the public welfare, is illustrated by the allegations of the bill of complaint. It there appears (*Rec.*, pp. 4, 5) that after Mrs. Corrigan had entered into the contract to sell her residence to Mrs. Curtis, a number of the other parties to the covenant protested against her act. Whereupon Mrs. Corrigan wrote to these persons stating "in effect that her personal interests made it imperative that she dispose of said lands and premises at once." She offered, however, to sell the premises to them on the same terms as were provided in the contract of sale to Mrs. Curtis, provided they would indemnify her, but the plaintiff alleges "that such proposal last named has not been and will not be accepted by plaintiff, nor, so far as plaintiff is aware and believes, by any of the other parties to said indenture or covenant."

By reason of this covenant Mrs. Corrigan, therefore, however imperative her needs, is prevented from selling her property to a willing purchaser at a price which her co-covenantors are unwilling to pay. She is thus at their mercy, as are her creditors. The market value of her property is consequently seriously impaired, and as the years go on and surrounding conditions are likely to change, its marketability may become more and more lessened, and with it its assessable value, to the serious detriment of the public.

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(3) *Independently of our public policy as deduced from the Constitution, statutes and decisions, with respect to the segregation of colored persons and the fact that the covenant sued upon is in restraint of alienation, we contend that such a contract as that now under consideration militates against the public welfare.*

There can be no permissible distinction between citizens based on race, creed or color if we are to remain a free and harmonious nation. To have it appear in the judicial annals of our courts that one part of our citizenry may enter into contracts which are derogatory to another part, is intolerable, unless we are to abandon our most cherished traditions. If the different component elements constituting the body of American citizens can vote together and serve under the same flag, perform the same civic duties, pay the same taxes and cooperate in the development of our national resources, to say that a part of them shall not breathe the same air or live in the same neighborhood or pursue the same business as the other part, because they are colored, is to sow the seeds of discord and would tend to destroy that unity and harmony which should prevail in a free country.

The restrictive covenant in the present case relates to the ownership and occupation of property in a residential district. If such a covenant is valid, then what would prevent similar covenants with respect to districts devoted to commerce or manufacture? What would there be to prevent a similar covenant concerning the sale or holding of store property on Fifth Avenue or Broadway in the City of New York, on Pennsylvania Avenue in the City of Washington, on Chestnut Street in the City of Philadelphia, on State Street in the City of Chicago, to negroes or to any person or persons of the negro race or blood? What would prevent such a contract with regard to land devoted to mining or to agriculture, to forestation or to any other lawful human activity?

But why need this discussion be limited to a covenant

restricting the sale, conveyance, lease or gift of land to negroes or to any person or persons of the negro race or blood? Following the precedent created by the decisions rendered in the Court below, similar covenants have made their appearance in various parts of the country restrictive of sales and leases of land not only to negroes, but also to Jews. It will not take long before the prohibition will be extended to Catholics, and the entire Ku Klux Klan program of elimination might be made effective by means of restrictive covenants. By means of like covenants differences might be made between rich and poor, between members of different churches, between the adherents of different political parties, between the descendants of those of different origins, between native and naturalized citizens, between those who have come from the North and the South, the East and the West. It would lead to positive public misfortune and were our Courts to sanction such covenants it would give rise to untold evils.

It is also significant that the covenant forbids the use or occupancy by or the sale, conveyance, lease, rental or gift to "any person or persons of the negro race or blood." That would mean that a person who has flowing in his veins a single corpuscle of negro blood would come within the prohibition of the covenant. It would have included Alexander Dumas, and thousands of men and women, one of whose remote ancestors, not only of an antecedent third or fourth generation, but of the tenth generation back, might have been a negro. How is that damning taint to be ascertained? Who is to determine when negro blood changes its color? Are the courts to make the microscopic and biological tests which will determine whether an intending purchaser or occupant of premises coming within the scope of this covenant is to be precluded from the ownership or occupancy of so sanctified a piece of land?

Let us now consider the decisions bearing on the aspect

of the covenant coming within this subdivision of our argument.

We have already referred to *Gondolfo v. Hartman*, 49 Fed. Rep., 181, as discountenancing such covenants.

A similar case is *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App., 150, 152, where the Court refused to enforce a condition in a deed providing for forfeiture in case of the sale or lease of property to any person of African, Chinese or Japanese descent.

At page 157 the Court said:

"The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to and inconsistent with, the estate conveyed. To transfer a fee and at the same time restrain the free alienation of it is to say that a party can grant and not grant, in the same breath. But the rule is not founded exclusively on this principle of natural law. *It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership and in freeing it from embarrassments which are injurious not only to the possessor, but to the public at large.*"

At page 160:

"If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese, or Japanese descent, it may be made to depend upon his not selling or leasing to persons of Caucasian descent, or to any but Albinos from the heart of Africa, or blond Eskis-

mos. It is impossible on any known principle to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese, or Japanese ancestors, shall not be deemed an unreasonable restraint upon alienation, but that the proscribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be; the principles of natural right, *the reasons of public policy*, and that principle of the common law which forbids restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other."

A petition to have the case heard in the California Supreme Court was unanimously denied September 8, 1919.

In the opinion subsequently rendered in *Los Angeles Investment Co. v. Gary*, 181 Cal., 680, which will be presently discussed, the Court referred in terms of praise and approval to the opinion of Judge Finlayson in *Title Guarantee & Trust Co. v. Garrott*, adding:

"The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing."

Consequently the Supreme Court of California likewise decided that a condition or covenant that property conveyed "shall not be sold, leased or rented to one not of

the Caucasian race until after January 1, 1930," was void at common law as against public policy, irrespective of the fact that the restraint on alienation was but partial and was limited to persons of a particular class or to a comparatively brief period.

In *State v. Darnell*, 166 N. C., 300, 302, 303, 81 S. E. Rep., 338, an ordinance was adopted by the Board of Aldermen of Winston, N. C., pursuant to a provision of the city charter authorizing them to pass any ordinance which they deemed proper for the good order and general welfare of the city if it does not contravene the laws and Constitution of the State, which made it unlawful for any colored person to occupy as a residence any house upon any street on which a greater number of houses are occupied by white people than are occupied by colored people, and containing a similar provision as to whites. This ordinance was declared void in an interesting opinion by Chief Justice Clark, who pointed out that such legislation was similar in its character and tendency to that which years ago prescribed in Ireland limits beyond which the native Irish or Celtic population could not reside, thus creating what was called the "Irish Pale," and similar more recent legislation in Czaristic Russia, where the Jews were restricted in the right of residence in a limited territory known as the so-called Jewish Pale of Settlement. In each instance the consequences were tragic and resulted in infinite harm, and constituted powerful incentives to disorder and revolution. The following passage in his opinion calls attention to the underlying vice of the ordinance then under consideration, in terms which we regard as equally applicable to the covenant involved in the present case:

"We do not think that the authority conferred by Section 44 of the Charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the Legislature to authorize an ordi-

nance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our State. To do so would give the words 'general welfare' an extended and wholly unrestricted scope which we do not think the Legislature could have contemplated in using those words. If the Board of Aldermen is thereby authorized to make this restriction a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith.

"Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property which no statute will be construed as having power to take away."

It has been frequently laid down that even a restriction as to the manner of using land, in order to be valid, must not be contrary to public policy.

DeGray v. Monmouth Beach Club House Co., 50 N. J. Eq., 329, 24 Atl. Rep., 388;
Brewer v. Marshall, 19 N. J. Eq., 537.

The Covenant is Not Ancillary to the Main Purpose of a Valid Contract and therefore is an Unlawful Restraint.

Thus far we have treated the covenant the enforcement of which the Courts below have decreed, in its general aspects. *It now becomes important to call attention to an outstanding fact, namely, that at the time when the covenant was entered into, the various parties who executed it, severally owned the twenty-four parcels of lands described therein and on which at the time there had been erected separate dwelling houses. None of them at the time of its execution and in connection therewith acquired from any of the others title to the lands which they respectively owned. None of them had entered into a contract with the others to which the covenant was an incident or ancillary.* We have, therefore, an agreement between twenty-four adjoining landowners whereby they agreed among themselves not to sell, convey, lease, rent or give the premises owned by them respectively to negroes or to any person or persons of the negro race or blood.

While it may be claimed that this covenant was not one relating to trade or commerce, in the strict sense of the term, nevertheless, in these later days, the tendency of the law has been to encourage the transferability of real estate with the same facility as has long existed in the case of personalty. The public policy of today favors the ready transfer of realty from one person to another. In *Manierre v. Willing*, 32 R. I., 104; 78 Alt. Rep., 519, Mr. Justice Parkhurst, quoting the opinion of Mr. Justice Christiancy in *Mandlebaum v. McDonell*, 29 Mich., 79, expressed the prevailing policy when he said:

"and certainly, in a country like ours, where lands are as much an article of sale and traffic as personal property, and the policy of the State has been to encourage both the acquisition and easy and free alienation of lands, such restrictions ought not be encouraged by the Courts."

The same idea was expressed by Mr. Justice Garber in *Test Oil Co. v. LaTourrette*, 19 Okla., 214, 91 Pac. Rep., 1025, 1028:

"In this country land is one of the chief objects of trade and investment—'mud and civilization go together'. As the latter advances the transfer of the former becomes more frequent. Just in the degree that the temporary owner of a tract of land is permitted to impress his notions or caprices upon the fee restricting its future alienation, just in that degree does it hamper the terms and facility of its exchange in trade and destroy that continuance which has given it the reputation of being the subject of safe and sound investment. Hence restrictions upon the alienation of the fee in land are repugnant to trade and commerce, and are looked upon with disfavor by the law."

Moreover, as has been shown under the preceding subdivision of this argument, long before the rule of public policy which forbade restraint of trade in merchandise or the like, came into being, contracts in restraint of the alienation of realty had been treated as opposed to public policy. Hence it is our contention that the covenant now under consideration, which, as an independent agreement between the parties thereto, limits the sale of land or its occupancy to a certain class of human beings and excludes other of God's children from the right to occupy or purchase it, in the aspect of public policy comes at least within the rules applicable to the restraint of trade in personality.

In *United States v. Addyston Pipe Co.*, 85 Fed. Rep., 271, affd. 175 U. S., 211, Mr. Chief Justice Taft, then writing for the Circuit Court of Appeals for the Sixth Circuit, classified the decisions in which covenants in *partial* restraint of trade had been upheld. They involved agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service.

Referring to this classification, it was added (p. 281):

"Before such agreements are upheld, however, the Court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the *buyer* of the property, good-will or interest in the partnership *bought*; or (4) to the legitimate needs of the existing partnership; or (5) to the prevention of possible injury to the business of the *seller* from the use by the *buyer* of the thing *sold*; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. * * * It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced *unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the cove-*

nantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner v. Graves*, 7 Bing., 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfeldt v. Maxim Nordenfeldt Co.* (1894) App. Cas. 535, 567) used the following language:

'We do not see how a better test can be applied to the question whether this is or is not a reasonable restraint of trade than *by considering the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.* Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. *Whatever is injurious to the interests of the public is void on the ground of public policy.'*

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one one of the parties from the injury which, in the execution of the contract or the enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contracts suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."

See also 13 *Corpus Juris*, title "Contract," Section 420, page 477, and cases cited.

In the present case there is an utter absence of those elements which in the case cited were deemed to justify covenants in partial restraint of trade.

That this principle is applicable to restrictive covenants affecting real estate appears from the decisions collated in 3 Williston on Contracts, Sec. 1642.

This doctrine does not owe its existence to the Sherman Act, or any other similar legislation. It is a principle enforced by the courts both at common law and in equity, long prior to such legislation.

As applicable to this discussion, we take the liberty of quoting extensively from the opinion of Mr. Justice Hughes in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373. The question there involved was as to whether a manufacturer, in connection with the sale of his product, may affix conditions as to the use of the article sold or as to the prices at which purchasers may dispose of it. There the condition was ancillary to a sale. Yet it was held, for reasons about to be pointed out, that such conditions were contrary to public policy, and, therefore, void. Mr. Justice Hughes said:

"But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, section 360, 'be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest or property is out of

him, so as he hath no possibility of reverter; and it is against trades and traffic and bargaining and contracting between man and man.' *Park v. Hartman*, 153 Fed. Rep., 24. See also Gray on Restraints, on Alienation, Sections 27, 28."

At page 406 the opinion continues:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. * * * 'The true view at the present time', said Lord Macnaghten in *Nordenfeldt v. Maxim Nordenfeldt & Co.*, 1904, A. C., page 565, 'I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.'

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them."

Let us apply the principle of this decision to the case now under consideration. Here the various covenantors merely combined among themselves to restrain one another and their respective heirs and assigns either permanently or for a period of twenty-one years, from selling property belonging to them respectively, in the ownership of which they continued, to negroes or any person or persons of the negro race or blood. They thereby limited the number of possible purchasers. The effect would be either unduly to depress or unduly to increase the price at which the property might be sold. At all events it tended to restrict competition. The covenant happened to exclude from the list of possible purchasers or occupants negroes or persons of the negro race or blood. That excluded upwards of ten million citizens of the United States, or ten per cent. of the entire population. If Catholics and Jews had been added to the number of those blacklisted, it would have limited the possible purchasers to the extent of upwards of twenty million more of our citizens, or an additional twenty per cent. of the population.

If a covenant like that under consideration, entered into

by white persons, is valid, then a corresponding covenant by colored land-owners restricting the sale of their property so as to exclude all white persons or those of the Caucasian race or blood as possible purchasers, would be equally permissible. That would affect at least 100,000,000 of our population. Is that not a *reductio ad absurdum* of the contention that covenants of this character are not opposed to public policy?

If the various dealers in woolen cloth or shoes or prepared articles of food carrying on business in Washington had covenanted with each other not to sell or to give any of their products to these several classes of human beings coming within the ban of their displeasure, it is believed that our courts would not long hesitate to declare such a covenant as contrary to public policy. How does the illustration differ in principle from the covenant now under discussion? The fact that in the one case the covenant relates to the acquisition of a habitation and in the other of articles of clothing or of food, does not constitute a valid ground for differentiation. As was said by Mr. Justice Holmes in *Block v. Hirsh*, 256 U. S., 156, "housing is a necessary of life." It is as much a necessity for those of the negro race or blood as it is for those of the white race.

If covenants of this character are valid in relation to the property on one city block, they would be equally applicable to a hundred, or, if there were so many, a thousand city blocks in the City of Washington, and since, as was said in the opinion in the case just cited, "the space in Washington is necessarily monopolized in comparatively few hands", the cumulative effect of such covenants would be to drive out of the City of Washington, and for that matter out of the District of Columbia, all or most of the persons of the negro race or blood whose business or occupation or interest it is to pursue their respective vocations in that City or District as it is a matter of public interest that they should pursue their vocations there. Such a scheme is not an unheard of conception. It was attempted

in *In re Lee Sing*, 43 Fed. Rep., 359. According to the census of 1920 the white population of the District numbered 326,860 and the negro population 109,966, or nearly a quarter of the entire population. It is also interesting to note parenthetically that the covenant would practically preclude the white owner of any one of the houses affected by it, to permit domestic servants of the negro race or blood to live upon his premises.

It surely cannot be said that our courts are more tender in their consideration for those affected by trade and commerce in personal property than they are for the welfare of those human beings who desire to establish homes and to acquire the ownership or the right of occupancy of a place which they may call their own.

Mrs. Curtis is certainly entitled to as much freedom from restraint upon her right to acquire a habitation where she and her family may lay their heads, as were the vendees of the patent medicine of Dr. Miles Medical Company to be free from the restrictions as to price imposed by the vendor of that panacea. She should not for a moment be lost sight of in this controversy. Her liberty to acquire property is as much involved as is the liberty of Mrs. Corrigan to sell hers. The right of both of them to contract with respect to the premises here in question is to be determined, that is, the right of disposition by the one, and the right of acquisition by the other.

In the aspect of the case now under discussion, namely, that of a covenant containing a restraint on the right of alienation or of use or occupation which is not incidental to and in support of another contract, or a sale of property or of a business, it is a subject of serious consideration as to whether such a covenant entered into, as in this case, by twenty-four different individuals, would not constitute a common law conspiracy. The decision in *Callan v. Wilson*, 127 U. S., 540, 555, 556, would so indicate.

That case was cited in *Granada Lumber Co. v. Mississippi*, 217 U. S., 440, 441, where Mr. Justice Lurton said:

"But when the plaintiffs-in-error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of conspiracy, and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed" (*Cellan v. Wilson*, 127 U. S., 555, 556).

To the same effect is *Eastern States Lumber Assn. v. United States*, 234 U. S., 600, 614.

While it is true that in the first of these cases, the question directly involved related to the constitutionality of a statute of Mississippi, and that the second was an action brought under the Sherman Anti-Trust Act, it is nevertheless believed that the principle invoked was one which related to a common law conspiracy.

(4) *We are not unmindful of the cases relied upon in the court below to sustain the enforcement of this covenant. We contend that these decisions are not only unsound but also distinguishable.*

They are:

Los Angeles Investment Co. v. Gary, 181 Cal., 680;
Queensboro Land Co. v. Cazeaux, 136 La., 724;
Koehler v. Rowland, 275 Mo., 573;
Parmalee v. Morris, 218 Mich., 625.

(a) So far as they undertake to sustain the validity of such a covenant as that now under discussion, we contend that the conclusions reached are erroneous, since they disregard the legitimate scope and effect of the decision in *Buchanan v. Warley* and of Sections 1977 and 1978 of the Revised Statutes and the mischief that is inherent in such

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a covenant. They fail to differentiate between restrictions in deeds which prohibit the use of property for certain purposes, such as that considered in *Cowell v. Springs Co.*, 100 U. S., 57, and a covenant which constitutes a segregation of negroes from other citizens. They likewise overlook the distinction between such a case as the present and cases like *Plessy v. Ferguson*, 163 U. S., 537, and the *Berea College Case*, 211 U. S., 45, which was fully pointed out in *Buchanan v. Warley* and in *Carey v. City of Atlanta*, 143 Ga., 192.

(b) In *Los Angeles Investment Co. v. Gary, supra*, the Court as has already been pointed out, approved of the decision in *Title Guarantee & Trust Co. v. Garrott, supra*, in so far as to hold that a condition or covenant in partial restraint on alienation, whether limited to a particular class of persons or to a comparatively brief period, was void because contrary to public policy. The Court, however, held that so much of the covenant which it then had under consideration as provided "nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots," was not a restraint upon alienation, but upon the use of the property, and was, therefore, valid.

The decision was by a divided court which consisted of five members, two of whom, Mr. Chief Justice Angelotti and Mr. Justice Lennon, having dissented. It likewise appears from the opinion of Mr. Justice Olney, that the Court had "not been favored by either brief or argument on behalf of the respondents," that is, the parties against whom the condition was sought to be enforced. Moreover, the question of public policy in its broad aspects was not discussed.

The prevailing opinion further contains the striking qualification:

"In connection with this decision it may be well to add that what we have said applies only to re-

straints upon use imposed by way of condition, *and not to those sought to be imposed by covenant merely.* The distinction between conditions and covenants is a decided one and the principles applicable quite different."

Furthermore, it would seem that, if a restriction upon alienation is opposed to public policy, a covenant which would seek to prevent the use and occupancy of property by its owner would be equally contrary to public policy. It would tend to produce the same evils as those which brought about the rule with respect to restraints on alienation. The right to use and occupy property is an essential incident of ownership. It was so recognized in *Buckanan v. Warley* (see p. 7, *supra*). Of what avail would be the right to acquire the title of property, if the grantee may not take it into his possession and enjoy its use? If Mrs. Curtis could not be debarred from becoming the owner of the fee of the premises which Mrs. Corrigan was ready to convey to her, was her right of ownership to be limited to the leasing of the property to white tenants? The distinction sought to be drawn leads to a palpable absurdity.

(c) In *Queensborough Land Co. v. Cazeaux, supra*, and *Kohler v. Rowland, supra*, the Court had under consideration conditions in deeds which provided for forfeiture were the premises conveyed to be sold or leased by the grantee to a negro. In both cases it was held that the conditions did not constitute unlawful restraints upon the power of alienation.

Commenting on these decisions in his opinion in *Title Guarantee & Trust Co. v. Garrott*, Mr. Justice Finlayson said:

"With neither of them do we agree. The Louisiana case was decided in accordance with the principles of the civil law, and can throw but little, if any, light upon the construction of our Code provision, based, as it is, on the common law of England—a body of law that, ever since the statute *quia emptores*, has

more and more treated land *as an article of sale and traffic*, as much so as personal property. In the Missouri case the Court in one brief paragraph disposes of this difficult question out of hand, citing but one case, *Cowell v. Colorado Springs Co.*, 100 U. S., 55, to sustain its statement that, 'it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes.' In short, the Missouri court's decision is based upon a dictum of Mr. Justice Field—a dictum by one of the country's most learned jurists, it is true, but a dictum nevertheless which, so far as it refers to a time limitation upon alienation, is contrary to all the well-reasoned cases, such as *Mandlebaum v. McDonell*, *supra*, and in so far as it refers to restraints that are partial as to persons or classes of persons, is, we believe, contrary to logic and contrary to the clear implication of the Supreme Court of this State in *Murray v. Green*, 64 Cal., 367, 368, that any restraint whatever upon the power of alienation, however partial or temporary, or of whatever character, is violative of Section 711 of our Civil Code, and, furthermore, it is dictum that is pregnant with uncertainties that necessarily would produce the greatest inconvenience in the world of trade and commerce, for no one could say whether any particular restriction was reasonable until the question had been litigated to the court of last resort, and no judge could know what standard of certainty should be employed to determine the question."

Further referring to *Cowell v. Colorado Springs Co.*, Mr. Justice Finlayson pointed out:

"What that learned jurist (Mr. Justice Field) said about restraint upon alienation was dictum pure and

simple and not in accord with the weight of authority nor the better reasoned cases. That that part of the excerpt from the opinion of Mr. Justice Field wherein he animadverts upon restraints upon alienation, is dictum, the Federal Supreme Court itself has declared in the subsequent case of *Potter v. Couch*, 141 U. S., 315."

In this connection it is likewise proper to refer to the comments of Professor Gray upon *Cowell v. Springs Co.*, and other similar cases, in Sections 40, 52-54 of the second edition of his scholarly work on "Restraints on the Alienation of Property."

(d) *Parmalce v. Morris*, *supra*, like *Los Angeles Investment Co. v. Gary*, *Kohler v. Rowland* and *Queensborough Land Co. v. Cazeaux*, was a case arising on a condition contained in a deed which conveyed property which was the subject of the restriction. In neither of these cases was there a covenant between independent owners of land each of whom had acquired a title free from condition or restriction of the character sought to be created. Moreover, *Parmalce v. Morris* was decided on the authority of the other three cases, and, therefore, depends upon the soundness of the reasoning of those cases, which, we contend, does not subserve the public welfare.

The opinion of Mr. Justice Moore in *Parmalce v. Morris* seems to proceed on a misunderstanding of a legitimate argument presented in opposition to the validity of such a condition. The fallacy of the conclusion reached becomes evident from these excerpts from the opinion:

"Suppose the situation was reversed and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would any one think that dire results to the white race would follow an enforcement of the restriction?"

We answer that such a restriction would be as vicious as that of which we are now complaining. If the negroes possessed the wealth of the Caucasians and could acquire property just as the Caucasians are now enabled to acquire it, would it not lead to unfortunate consequences if such a condition were aimed at a Caucasian by a negro?

Let us continue the argument to its legitimate consequences, and suppose that it was a Catholic who had conveyed lands with the condition that it should not be occupied by a Protestant, or vice versa, or if one of German, Irish, French or Italian descent had conveyed property on the condition that it was not to be occupied by an Englishman or a Scotchman or by one who was a native of New England, or California, or Iowa, or Tennessee. Would it not be said at once that such a restriction boded mischief to the public good?

The opinion continues:

"The issue involved in the instant case is a simple one, i. e., shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be absolved from the provisions of the law simply because he is a negro?"

Our answer is that the provision is void, not "simply" because the person against whom it is sought to be enforced is a negro, but because it is contrary to the genius of our American institutions, to the spirit of the Constitution, and to the peace, quiet, good order, unity, harmony and dignity of the people of the United States.

The attack is made on this covenant because it is opposed to the fundamental principles on which our Government rests, that all men are created equal and that they are entitled to the protection of their lives, their liberty, and their property. It is believed that our courts will not, by their decrees, effectuate a purpose which destroys our cherished traditions and which would recognize

and tend to create a system of caste. The moment that there is a differentiation in our courts between white and black, Catholic and Protestant, Jew and non-Jew, hatreds and passions will inevitably be aroused, and that which has been most noble and exalted and humane in American life will have been shattered. Great as are the mental and spiritual sufferings of those against whom the shafts of prejudice and intolerance are aimed, the lasting injury is, however, inflicted upon the civilization of a country which connives at a covenant such as that which has been enforced by the decrees here sought to be reviewed. Mrs. Curtis may well say to the covenantors, in the words of the unknown Negro poet celebrated by Thomas Wentworth Higginson:

“I go to de jedgment in de evenin’ of de day
 When I lay my body down,
 An’ my soul an’ your soul will meet in de day
 When I lay dis body down.”

(5) *Here the appellee has resorted to a court of equity to enforce a covenant which, so far as Mrs. Curtis is concerned, who was a stranger to the covenant, is oppressive and unreasonable and lacking in equity.*

She was not a party to the agreement. She is a victim of its prohibitions. It is an impairment of her right to acquire real property as conferred by Section 1978 of the Revised Statutes, and, consequently, it is believed that a court of equity should not make itself a party to effectuate the scheme whereby it is sought to deprive her of the rights secured to her by the Constitution and the statutes of the United States and its public policy.

4 Pomeroy's Equity Jurisprudence, 3d ed., Secs. 1404, 1405;
Cathcart v. Robinson, 5 Peters, 263;
Pope Mfg. Co. v. Gormully, 144 U. S., 236, 237;
Curran v. Holyoke Water Co., 116 Mass., 90.

III.

It is respectfully submitted that the decrees appealed from should be reversed and the motion to dismiss the bill of complaint granted.

JAMES A. COBB,
HENRY E. DAVIS,
WILLIAM H. LEWIS,
JAMES P. SCHICK,
Attorneys for Appellants.

MOORFIELD STOREY,
LOUIS MARSHALL,
ARTHUR B. SPINGARN,
HERBERT K. STOCKTON,
of Counsel.